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# No. 327

**IN THE**

## Supreme Court of the United States

**October Term, 1961**

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CITY OF AKRON, ET AL.,

Appellant,

vs.

THE STATE OF OHIO, EX REL., MARK McELROY, ATTORNEY GENERAL,

Appellee.

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## MOTION TO DISMISS APPEAL

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## MOTION TO DISMISS APPEAL

Comes now the State of Ohio, the Appellee herein, by its duly elected Attorney General, and moves this Court to dismiss with costs the appeal taken herein to this Court by City of Akron, upon the following grounds:

1. There is no federal question involved.

2. The federal question sought to be reviewed was not timely or properly raised.

3. The decree of the Supreme Court of Ohio did not expressly pass on the claimed federal question.

4. The decree of the Supreme Court of Ohio rests on adequate non-federal basis.

5. The appeal is not taken in conformity to the rules of this Court, Rule 15, Section (d).

## STATEMENT

This motion to dismiss the appeal is filed in accordance with Rule 16 of the Rules of the Supreme Court of the United States and in response to the jurisdictional statement filed by appellant and received by appellee on August 13, 1962.

## ARGUMENT.

**1. There is no federal question involved.**

Appellant has specified as its first basis of appeal and question presented the claimed conflict of Section 1547.61 of the Ohio Revised Code with the due process clause of the 5th Amendment of the United States. (Notice of Appeal, 3A and Jurisdictional Statement, page 2) The Fifth Amendment is not applicable to, or restrictive of, state legislation. *Withers v. Buckley*, 20 How. (61 U.S.) 84, 15 L.Ed. 816. The Fifth Amendment applies to the United States only, and not to laws or proceedings under the authority of a state. *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 46 L.Ed. 171, 22 S.C.R. 120; *Winous Point Shooting Club v. Caspersen*, 193 U.S. 189, 48 L.Ed. 675, 24 S.C.R. 431. The latter case held as follows:

> "No Federal question which will confer jurisdiction of the Supreme Court of the United States of a writ of error to a state court is involved in a contention in the highest court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the 5th Amendment to the Federal Constitution, since this amendment operates solely as a restriction upon Federal powers, and not upon those of the several states."

An allegation in the record based upon the due process clause of the Fifth Amendment will not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment. *Chapin v. Frye*, 179 U.S. 127, 129-130.

As hereafter indicated, it is the position of appellee that the due process clause of the Ohio Constitution *only* was presented to and passed upon by the Ohio Supreme Court.

Irrespective, no federal question has been assigned nor should be considered upon this claimed basis for review:

> "The Supreme Court, upon an appeal from a state court, will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state court."

*Flournoy v. Wiener*, 321 U.S. 253, 88 L.Ed. 708, 64 S.C.R. 548 (1944).

It is further submitted that appellant can not justify this deficiency on the basis of improvidence. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 edition) Section 20, at page 45 reads as follows:

> "• • • In considering the statement as to jurisdiction upon appeal, filed under Rule 12, the Supreme Court inquires not merely whether the case is reviewable on appeal as distinguished from certiorari, but whether a defect to review by either mode exists. If such a defect does exist, 28 U.S.C. Sect. 2103 has no application and the appeal is summarily dismissed without considering the appeal papers as a petition for certiorari." (Citing *Flournoy v. Wiener*, supra)

The second basis of appeal presented by appellant (Notice of Appeal 3B and Question 2, Jurisdictional Statement p. 2) questions the validity of this state statute under the provision of a state constitution, namely the homerule amendment of the Ohio Constitution, Article 18, Section 3. With questions whether the state statute is invalid under the state constitution, the Supreme Court will have nothing to do in reviewing state court decisions. *Montana ex rel. v. Rice*, 204 U.S. 291; *Smith v. Jennings*, 206 U.S. 276; *Southwestern Oil v. Texas*, 217 U.S. 114, 118-119; *Brown-Forman v. Kentucky*, 217 U.S. 563. Moreover, it is well settled in this court that it must be made to appear that some provi-

sion of the federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth. *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273.

Where question presented below was validity of statute under state Constitution it could not be urged in the Supreme Court that the statute was violative of the federal Constitution: *Gibbes v. Zimmerman*, 290 U.S. 326, 78 L.Ed. 342, 54 S.C.R. 140.

The third basis for appeal presented by appellant (Notice of Appeal 3B and Question 3, Jurisdictional Statement page 2) is ambiguous, but certainly neither specifies nor presents a federal question under the United States Constitution. For the foregoing reasons, it is submitted that no federal question is involved.

**2. The federal question sought to be reviewed was not timely or properly raised.**

As specified in branch 1 of the motion herein, no federal question is presented. Furthermore, any claim under the Federal Constitution, and that is specified as the Fifth Amendment, is raised for the first time in the Notice of Appeal and the Jurisdictional Statement filed herein. The Court will note no reference to the U. S. Constitution or federal questions in the opinion of the Supreme Court of Ohio. (Appendix E, pages 33-40, inclusive of the Jurisdictional Statement)

It is too late to raise the federal question for the first time in the Notice of Appeal to the Supreme Court or in the Jurisdictional Statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue. *White River Lumber Co. v. Arkansas*, 279 U.S. 692, 700, 73 L.Ed. 903, 49 S.C.R. 457; *Hiawassee River Power*

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*Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 344, 64 L.Ed. 601, 40 S.C.R. 330.

Nor has such a question been properly raised. At most, the broad claim of "without due process and without compensation" was advanced in the answer of appellant before the trial court and a general discussion of due process by the Supreme Court of Ohio in its opinion without reference to a federal question. As will be discussed in item 3 herein, such is referable only to the due process provisions of the Ohio Constitution, one of which (Article 1, Section 19) is detailed by Appellant at page 4 of the Jurisdictional Statement. In any event, such a claimed federal question must be properly raised. A contention that certain instructions to the jury in a criminal case in effect deprived the accused of his liberty without due process of law does not, of itself, raise a federal question under the U. S. Constitution, 14th Amendment, with sufficient distinctness to sustain a writ of error from the Federal Supreme Court to a state court. *Thomas v. State of Iowa*, 209 U.S. 258. The Court, in its opinion, at page 263, stated as follows:

> "* * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution. See Clarke v. McDade, 165 U.S. 168, 172, 41 L.ed. 673, 17 Sup. Ct. Rep. 284; Miller v. Cornwall R. Co., 168 U.S. 131, 134, 42 L.Ed. 409, 410, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U.S. 78, 88, 49 L.ed. 394, 397, 25 Sup. Ct. Rep. 176."

**3. The decree of the Supreme Court of Ohio did not expressly pass on the claimed federal question.**

As indicated, general reference to "due process" by appellant and the Supreme Court of Ohio, in absence of specific reference to the United States Constitution, must be

considered in the light of state constitutional provisions. Ohio has such provisions, one of which has been specifically recited and relied upon by appellant.

Article I, Section 19 of the Ohio Constitution provides as follows:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Article I, Section 16 of the Ohio Constitution provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
> "(Suits against the state.) Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

These provisions have been interpreted by the Ohio courts as equivalent to the "due process" provisions of the Federal Constitution. 11 Ohio Jurisprudence (2d) pages 49-50, Constitutional Law, Section 698, reads as follows:

> "The provisions of the Federal Constitution refer to 'due process of law'; whereas the Constitution of this state uses the phrase 'due course of law.' 'Due course of law' is equivalent in meaning to 'due process of law,' or as expressed by the Supreme Court in an early case, they are 'one and the same thing.' Thus there is no difference respecting due process of law in the Constitutions of the United States and of Ohio. The due

course of law provision of Section 16 article I of the Ohio Constitution has been considered equivalent to the due process of law clause in the Fourteenth Amendment to the Federal Constitution. The clause in the Federal Constitution imposes no limitations upon the legislative power of the General Assembly of this state that is not imposed by its Bill of Rights. However, it has been asserted that the provision of the Ohio Bill of Rights relative to due course of law is much broader than the due process clause of the fourteenth Federal Amendment." (Citing *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N.E. 672; *State v. French*, 71 Ohio St. 186; 73 N.E. 216, 104 Am. St. Rep. 770)

Of considerable import on this point is a case decided by the Supreme Court of Ohio in 1953 and involving the appellant herein, *The City of Akron v. Chapman*, 160 Ohio St. 382. The Supreme Court of Ohio at page 385 of the opinion states, in part, as follows:

"* * *

"Section 1, Article XIV, Amendments, United States Constitution, and Section 16, Article I, Ohio Constitution, both provide that no person shall be deprived of life, liberty or *property* without due process of law."

Accordingly, and in absence of specific reference, the Supreme Court of Ohio neither considered, nor was requested to consider federal "due process" but rather that provided by the Ohio Constitution.

**4. The decree of the Supreme Court of Ohio rests on adequate non-federal basis.**

As is clear from the opinion of the Supreme Court of Ohio (Appendix E, Jurisdictional Statement), such decree results from the consideration of three issues, only one of which was "due process". As just specified, "due process" was adjudicated under the state Constitution and the statute in question was held to be a reasonable exercise of the

police power thereunder. The two remaining issues also involved articles of the state Constitution, the home-rule amendment (Article 18, Section 3 of the Ohio Constitution) and the operation of public utilities by municipalities (Article 18, Section 4 of the Ohio Constitution). The contentions of appellant on each of these propositions were denied by the Supreme Court of Ohio, and the adjudication on any one of these questions is adequate to support the decree. Paragraph 4 of the syllabus of *Flournoy v. Wiener, Supra,* reads as follows:

> "The Supreme Court will not review a state court's decision of a Federal question where it is doubtful whether the decision does not rest on a non-Federal ground adequate to support it."

54 American Jurisprudence 801, United States Courts, Section 171, reads, in part, as follows:

> "* * * Unless the case involves a Federal question the judgment or decree therein is not reviewable in the Supreme Court, and before that Court will entertain jurisdiction to review a judgment of a state court it must affirmatively appear from the record that a real and substantial Federal question, as distinguished from one devoid of merit, frivolous, abstract, or moot, was involved, and that the decision of the state court on the Federal question was necessary to its determination of the cause. A review is precluded if the decision of the state court is upon a non-Federal ground or a point of local or general law sufficient to support the judgment. The Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state grounds or non-Federal grounds, and is the purpose of the Court as evidenced by many decisions to observe scrupulously this long-standing rule. The reason is obvious: it is found in the partitioning of power between the state and Federal judicial system and in the limitations of the Supreme Court's jurisdiction; its power over state

judgments is to correct them to the extent that they incorrectly adjudge Federal rights. The Court corrects wrong judgments, and does not revise opinions; it is not permitted to render an advisory opinion. Moreover, as a general rule the Court will not entertain jurisdiction to review a decision based upon both Federal and state grounds where the state ground is sufficient basis for the judgment rendered."

**5. The appeal is not taken in conformity to the rules of this Court, Rule 15, Section (d).**

Such section of Rule 15, Rules of the Supreme Court of the United States, requires specification of the stage in the proceedings and manner in which the federal questions sought to be reviewed were raised. A mere reading of the Jurisdictional Statement reveals the absence of any such compliance. As previously discussed, the only specific federal question is raised for the first time in the Notice of Appeal and the Jurisdictional Statement and such is limited to the Fifth Amendment. Such possibly accounts for the lack of the required specifications, but, in any event, such deficiency exists and should be the basis for dismissal.

For each of the foregoing reasons, it is respectfully submitted that the appeal of appellant should be dismissed.

Respectfully submitted,

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Dated September ...., 1962.